No. 78-418

In the Supreme Court of the United States

OCTOBER TERM, 1978

ASH GROVE CEMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-54a) is reported at 577 F. 2d 1368. The opinion and order of the Federal Trade Commission (Pet. App. 1a-32a) are reported at 85 F.T.C. 1123. Earlier opinions of the Commission (App., *infra*, 1a-5a) are reported at 76 F.T.C. 1076 and 81 F.T.C. 1051.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. The court of appeals denied a petition for rehearing on July 13, 1978 (Pet. App. 55a). The petition for a writ of certiorari was filed on September 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission's investigation of mergers in the cement industry and issuance of an enforcement policy statement relating to that industry amounted to a prejudgment of the issues or otherwise invalidated the Commission's decision in this subsequent merger case.

STATEMENT

1. In 1964 the Federal Trade Commission stated in an adjudicative opinion that it planned to institute a trade regulation rule proceeding[1] to study vertical acquisitions in the cement industry. *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964). The Commission then directed its Bureau of Economics to initiate an investigation to obtain information "concerning such matters as the structure of the cement-producing and principal cement-consuming markets, the nature of the relevant product and geographic markets, the causes and business reasons underlying such acquisition[s] and the probable effects of such acquisitions on competitive conditions of the market and industries involved * * *" (Pet. App. 37a).

Nearly two years later, based in part on information received from responses to compulsory process served on members of industry, the Bureau of Economics prepared a study entitled *Economic Report on Mergers and Integration in the Cement Industry* ("Economic Report"). The Commission published the study in April 1966 but explained that it neither "approved [n]or disapproved the matters contained in the report" (*id.* at viii). The Commission then held public hearings to afford interested persons an opportunity to express their views on the subject of vertical mergers in the cement industry. 31 Fed. Reg. 6285 (1966); 31 Fed. Reg. 7772 (1966). Oral and written statements from industry members, including petitioner, were received.

In January 1967 the Commission issued a statement entitled "Enforcement Policy With Respect to Vertical Mergers in the Cement Industry" ("Enforcement Policy").[2] That statement expressed concern about vertical mergers in the cement industry. It observed that members of the industry had requested the Commission to clarify the legal status of such mergers (Enforcement Policy at 1-2). The Commission concluded that, based on the information then available to it, acquisitions of ready-mix concrete companies by cement firms "*can have* substantial adverse effects on competition in the particular market areas where they occur." *Id.* at 2; emphasis added. The Commission notified the industry that it intended to challenge acquisitions that appeared to satisfy certain criteria set forth in the Enforcement Policy. The Commission made it plain, however, that any issues in a proceeding brought by it would be decided on the record in that case. *Id.* at 8-9; Pet. App. 38a.

2. In 1969 the Commission issued a complaint charging petitioner with violating Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring two Kansas City ready-mix

[1] The Commission's rules of practice in effect between 1963 and 1967 described trade regulation rules as "rules [that] interpret and inform businessmen of legal requirements applicable to the practices of a particular industry * * *." 16 C.F.R. 1.62 (1964). The rules of practice further provided that in connection with any trade regulation rulemaking proceeding the Commission "may conduct such investigations, make such studies, and hold such conferences as it may deem necessary." 16 C.F.R. 1.67 (1964).

[2] No trade regulation rule was proposed or adopted by the Commission.

concrete companies and with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by acquiring certain assets owned by shareholders of one of the companies. Petitioner sought dismissal of the complaint on the theory that the 1967 Enforcement Policy statement amounted to a "trade regulation rule" that was beyond the authority of the Commission to promulgate.

The Commission declined to dismiss the complaint, observing that the "Statement of [Enforcement] Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission." 81 F.T.C. 1051-1052; App., *infra* 1a-3a. Reiterating an assurance it had given in other cement merger proceedings, the Commission stated: "[i]n each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents." *Ibid.*

An administrative law judge later sustained the charges of the complaint. The Commission affirmed the ruling of the administrative law judge with respect to the acquisitions of the ready-mix concrete firms and ordered divestiture (Pet. App. 1a-26a).[3]

3. The court of appeals affirmed the Commission's order. The court observed that petitioner had not contended that the evidence supporting the Commission's findings is not substantial: "Indeed, such a contention would be frivolous. The FTC conducted hearings at which voluminous testimonial and documentary evidence was

[3]The Commission reversed the administrative law judge's finding that the asset acquisition had significant anti-competitive effects (Pet. App. 17a-18a).

introduced by both sides. Extensive direct and circumstantial evidence in the record supports the conclusion eventually reached by the Commission" (Pet. App. 52a).

. Addressing the argument of petitioner that the Enforcement Policy statement is a "rule," the court concluded that the statement "was created and published to increase the expertise of the Commission and to provide guidance for agency staff and industry members plus their counsel regarding the enforcement intention of the FTC with respect to the cement industry. As such it is not a trade regulation rule" (Pet. App. 42a). The court also concluded that the Commission has authority to conduct investigations of possible violations of Section 7 of the Clayton Act "through the medium of a trade regulation rule proceeding" (Pet. App. 42a-45a). The court found nothing improper in the issuance of enforcement guidelines in light of the Commission's assurance that the views set forth in the guidelines are not binding on parties or the Commission and that issues raised in individual enforcement proceedings would be decided on the facts of record in those proceedings (Pet. App. 41a-42a).

ARGUMENT

The decision below conflicts with no decision of this Court or any court of appeals. The decision is correct, and further review in this Court is not warranted.

1. Petitioner's contention (Pet. 12-14) that the Commission was improperly influenced by an unauthorized trade regulation rule is insubstantial. The Commission did not resolve any issues in this case on the basis of a trade regulation rule. As its opinion demonstrates (Pet. App. 2a-17a), the decision rests on a detailed analysis of the evidence and an application of this Court's decisions under Section 7 of the Clayton Act.

Moreover, the Commission has not adopted any "rule" governing mergers in the cement industry. The Commission's Enforcement Policy statement was not intended to be a rule and has not been treated as such in the various adjudicative proceedings that the Commission has instituted against vertical acquisitions in the cement industry (Pet. App. 41a-42a n.8).[4] The Enforcement Policy is nothing more than a public announcement of how the Commission plans to exercise its discretion to commence adjudicative proceedings. Any agency must have in mind some plan for allocating its scarce enforcement resources, and the plan does not become a prejudgment of particular cases just because it is announced to the public. In conducting a general investigation of vertical mergers in the cement industry and announcing an enforcement policy, the Commission was simply carrying out its statutory obligation "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).

Even if the Enforcement Policy were treated as a rule of some sort, that would not assist petitioner. Most litigated

[4]In support of its assertion that the Enforcement Policy statement is a "rule" which the Commission considers binding, petitioner refers to the fact that in other litigated cases involving vertical cement mergers the Commission has found violations. But those cases were adjudicated on full records, and the adequacy of the evidentiary showing of anticompetitive effect was affirmed in the cases that were appealed. *OKC Corp.* v. *FTC*, 455 F. 2d 1159 (10th Cir. 1972); *Mississippi River Corp.* v. *FTC*, 454 F. 2d 1083 (8th Cir. 1970); *United States Steel Corp.* v. *FTC*, 426 F. 2d 592 (6th Cir. 1970). These precedents simply show that meritorious complaints have been filed; they do not show reliance on a "rule" or "prejudgment" of any case.

cases are conducted against a background of legal rules that influence the outcome. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), for example, this Court established a number of legal principles that profoundly affected future horizontal merger cases. But the existence of those rules did not amount to "prejudgment" of any future case or disable the Court from deciding other bank merger cases. And so it is here. The Commission's use of an Enforcement Policy to summarize its experience with an industry and announce its concerns does not undermine the fairness of its decision-making process.[5] It is presumed that the agency will decide adjudicatory matters on their merits, and this presumption is not dissipated by a prior exposure to or discussion of the issues. *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948). See also *Withrow* v. *Larkin*, 421 U.S. 35, 47-58 (1975).[6]

2. Petitioner's contention (Pet. 10-12) that the Commission lacks authority to conduct an investigation to facilitate its enforcement of the Clayton Act is frivolous. The Commission must be able to inform itself about conditions in an industry, or it could never decide which cases to prosecute. The Commission has explicit statutory

[5]As the Commission stated in its discussion of the Enforcement Policy statement: "Respondents are entitled to have their cases adjudicated by commissioners with open minds, not empty ones." *Lehigh Portland Cement Co.*, 71 F.T.C. 1618, 1622 (1967).

[6]If petitioner's "prejudgment" argument were accepted, it would be impossible for the Commission to issue a complaint and subsequently determine the merits in a Section 7 case, both of which Congress has required it to do. See 15 U.S.C. 21(b).

authority to conduct investigations to assist in its law enforcement responsibilities.[7] And it has long been established that the investigative powers granted the Commission under the FTC Act are available to it in enforcing the Clayton Act. *Hunt Foods and Industries, Inc.*, v. *FTC*, 286 F. 2d 803, 806-809 (9th Cir. 1960), cert. denied, 365 U.S. 877 (1961); *FTC* v. *Tuttle*, 244 F. 2d 605, 610-616 (2d Cir.), cert. denied, 354 U.S. 925 (1957); *FTC* v. *Reed*, 243 F. 2d 308, 309 (7th Cir.), cert. denied, 355 U.S. 822 (1957).

But however that may be, the Commission's order in this case was issued at the conclusion of evidentiary hearings in which the Commission's counsel sustained the burden of proving a violation of the law. In these hearings, petitioner had all the procedural rights, including judicial review, that are afforded by the Commission's rules and the Administrative Procedure Act. Petitioner does not dispute here the correctness of the court of appeals' ruling that the Commission's decision rests on substantial evidence and complies with this Court's decisions under Section 7 of the Clayton Act. In these circumstances, even if the Commission lacked authority to undertake its prior investigation of the cement industry, its order would not be affected.

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[7]Section 6(a) of the Federal Trade Commission Act, 15 U.S.C. (1964 ed.) 46(a) provides:

> The Commission shall also have power -
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce * * * and its relation to other corporations and to individuals, associations and partnerships.

See also 15 U.S.C. (1964 ed.) 46(b).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

ASH GROVE CEMENT CO.

Docket 8785. Opinion and Order, Oct. 14, 1969

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the hearing examiner's certification of respondent's motion, filed September 16, 1969, requesting the Commission "to dismiss the complaint on the grounds that a fair trial of the issues has been made impossible by prejudgment on the part of the Commission."

Respondent contends that it will be unable to obtain a fair hearing and an impartial decision on the issues raised by the complaint because the Commission allegedly has already prejudged all or certain of the significant issues raised in the complaint in asserted contravention of the Commission's Rules of Practice, the Administrative Procedure Act, the Federal Trade Commission Act, the Clayton Act, and respondent's constitutional right to a fair hearing conducted according to the law.

Respondent states that the alleged prejudgment of the issues is demonstrated by reference to (1) the Commission's Enforcement Policy With Respect to Vertical Mergers in The Cement Industry, dated January 3, 1967; (2) the claimed adoption by the Commission of the staff Economic Report on Mergers and Vertical Integration in the Cement Industry, published in April of 1966; and (3) the Commission's asserted reliance upon the aforementioned Economic Report in certain prior adversary proceedings.

The issue raised by this motion is the same as that presented recently to the Commission in *Missouri*

Portland Cement Company, Docket No. 8783 (order and opinion issued August 13, 1969 [p. 1064 herein]). The Commission denied the request there and will do so in this matter for the same reasons. Respondent has made no showing in the references to the prior actions of the Commission in the cement industry to justify its charge that the Commission has prejudged the issues in this case. The courts have held that agencies are not disqualified by such prior investigations and reports. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *Pangburn* v. *Civil Aeronautics Board*, 311 F. 2d 349 (1st Cir. 1962). Accordingly,

It is ordered, That respondent's motion to dismiss the complaint on the grounds of alleged prejudgment be, and it hereby is denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

APPENDIX

ASH GROVE CEMENT COMPANY

Docket 8785. Order and opinion, Dec. 5, 1972.

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the certification of the administrative law judge, filed August 31, 1972, of respondent's motion to dismiss the complaint, filed August 16, 1972. Complaint counsel, on August 28, 1972, filed an answer in opposition to respondent's motion. The motion was certified to the Commission pursuant to Section 3.22(a) of the Commission's Rules of Practice.

In support of its motion respondent argues: first, that this proceeding is illegal because it is an attempt to implement and enforce the Commission's January 3, 1967, Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry which respondent claims is a "trade regulation rule" beyond the statutory authority of the Commission to promulgate; and, second, that by issuing this alleged "trade regulation rule" the Commission has prejudged the material issues and facts in this proceeding thereby rendering a fair trial herein impossible.

Respondent's first argument rests upon its assertion that our January 3, 1967, statement of Policy is a trade regulation rule. This assertion is incorrect. In an earlier interlocutory opinion and order, issued February 6, 1967, in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, we clearly indicated that that

Statement of Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission. As we stated:

> The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." * * *

* * * * * * *

The Commission reiterates that the respondents in these cases have in no way been prejudiced by the Statement of Enforcement Policy issued on January 3, 1967. In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Statement of Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents

are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones. * * * (71 F.T.C. 1619, 1621—22).

We see no reason to dwell upon respondent's second contention—alleged prejudgment on the part of the Commission because of the January 3, 1967 Statement of Policy. It already has been before us once before. *Ash Grove Cement Company*, Docket No. 8785 (opinion and order, October 14, 1969 [76 F.T.C. 1076]). Respondent ought not to have been permitted to raise it again. And, it certainly should not have been certified to the Commission. Respondent's argument is rejected for the reasons expressed in our previous opinion. Accordingly,

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for further proceedings.

Commissioner MacIntyre concurring in the result.